STATE OF MICHIGAN

COURT OF APPEALS

GLEN C. GATES,

Plaintiff-Appellee,

v

USA JET AIRLINES, INC.,

Defendant-Appellant.

UNPUBLISHED
February 5, 2008

No. 272860
Wayne Circuit Court
LC No. 98-833563-CK

Before: Jansen, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

In this employment arbitration case, defendant appeals by delayed leave granted the circuit court's order affirming the arbitration award and entering judgment in favor of plaintiff. We affirm in part, vacate in part, and remand to the circuit court for entry of an amended order consistent with this opinion.

We review de novo a circuit court's decision to enforce, vacate or modify a statutory arbitration award.[1] *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003). "'"[W]here it clearly appears on the face of the award or the reasons for the decision as stated . . . that the arbitrators through an error in law have been led to a wrong conclusion, and that, but for such error, a substantially different award must have been made, the award and decision will be set aside."'" *Saveski v Tiseo Architects Inc*, 261 Mich App 553, 555; 682 NW2d 542 (2004) (citations omitted).

Defendant first argues that the arbitral majority erred when it based its decision to award contractual bonus damages for plaintiff on defendant's failure to produce evidence within its control. Contrary to defendant's assertion, however, the arbitrators did not base their decision on an adverse inference drawn against defendant for failing to produce evidence. Instead, the arbitrators relied on the employment agreement itself, defendant's sales figures, and the compilation of data in plaintiff's supplemental brief. The arbitrators' statement concerning

[1] As defendant conceded at oral argument before this Court, the employment agreement at issue in this case provided for statutory arbitration rather than common-law arbitration. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146; 742 NW2d 409 (2007).

defendant's failure to adduce evidence within in its control was merely an admonishment. Despite defendant's assertion to the contrary, the arbitrators' statement in this regard does not provide proof that the arbitrators relied on an alleged adverse inference. Because it does not clearly appear on the face of the award or in the reasons for the decision that the arbitrators erroneously made or relied on an adverse inference, defendant is not entitled to relief with respect to this alleged error. See *Saveski, supra* at 555.

Defendant also argues that the arbitral majority erred by awarding plaintiff wrongful discharge damages, contractual bonus damages, and severance pay. These claims present questions that would require us to review the arbitrators' factual findings and to delve into the merits of the arbitrators' decision. Such matters are beyond the scope of this Court's review. See *Police Officers Ass'n of Michigan v Manistee Co*, 250 Mich App 339, 343; 645 NW2d 713 (2002).

> It is well settled that judicial review of an arbitrator's decision is limited. A court may not review an arbitrator's factual findings or decision on the merits. Rather, a court may only decide whether the arbitrator's award "draws its essence" from the contract. [*Lincoln Park v Lincoln Park Police Officers Ass'n*, 176 Mich App 1, 4; 438 NW2d 875 (1989) (internal citation omitted).]

Because defendant's arguments in this regard are outside the scope of this Court's review, defendant is entitled to no relief on these claims of error.

Defendant next argues that the arbitrators erred by awarding plaintiff arbitration costs. The arbitral majority awarded plaintiff arbitration costs pursuant to MCR 3.602(M) even though the arbitration agreement clearly stated that each party would bear the costs of the arbitrator it selected, and half the costs of the neutral arbitrator. MCR 3.602(M) states in relevant part that "[t]he costs of the proceedings may be taxed as in civil actions." Therefore, when the arbitration agreement or provision does not allocate costs, arbitrators are empowered to award costs as appropriate under the court rule. However, when the arbitration agreement specifically states that each party will bear certain costs, as is the case here, the arbitrators are bound to act within the terms of the agreement. *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 176; 550 NW2d 608 (1996). Because the arbitrators did not have the power to award costs, the arbitrators exceeded their authority, and the award of costs must be vacated. See MCR 3.602(J)(1)(c). On remand, the circuit court shall enter an amended order vacating the award of arbitration costs for plaintiff and directing that the costs of arbitration be paid as expressly set forth in the language of the arbitration agreement.[2]

Relying on *Hewitt v Reed City*, 124 Mich 6, 8-9; 82 NW 616 (1900), defendant lastly argues that the arbitration award must be vacated based on plaintiff's ex parte communication with the arbitrators after the case was submitted. In *Hewitt*, our Supreme Court vacated an arbitration award when one of the parties submitted a memorandum of authorities to the

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[2] Of course, the circuit court's amended order shall also set aside any interest on the arbitration costs that may have been awarded in favor of plaintiff.

arbitrator after the case was submitted. The parties in *Hewitt* were not represented by attorneys, and had agreed that they would not submit any legal arguments or briefs to the arbitrator. *Id*. The *Hewitt* Court held that the ex parte communication with the arbitrator violated the rules governing the submission of the case, and set aside the arbitration award without inquiring into whether the arbitrator was in fact influenced by the memorandum. *Id*.

We have reviewed the document at issue in the instant case, which plaintiff submitted to the arbitrators after the parties' dispute had already been submitted for decision. Even assuming arguendo that the document was truly ex parte in nature, we simply cannot conclude that the document had the same effect on the arbitrators as did the ex parte communication discussed in *Hewitt*. The ex parte document submitted by plaintiff in this case contains no novel legal arguments or substantive legal authority. Instead, it merely represents a compilation of defendant's own revenue figures for 1996, 1997, and 1998. As such, the substance of the document at issue was already known to defendant, and it can hardly be said that the information contained therein was intended "to influence the arbitrator[s] on a question of law." *Id*. at 8. Any improper communication between plaintiff and the arbitrators was therefore harmless, and plaintiff is entitled to no relief on this issue.

Affirmed in part, vacated in part, and remanded to the circuit court for entry of an amended order consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Karen M. Fort Hood